



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

APR 24 2012

Scott B. Mackenzie, Treasurer
Freedom's Defense Fund
2776 S. Arlington Mill Dr., #806
Arlington, VA 22206

RE: MUR 6555

Dear Mr. Mackenzie:

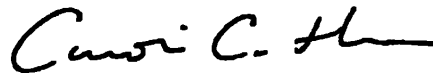
On June 22, 2011 we notified you of AR 11-03 indicating that in the normal course of carrying out its supervisory responsibilities, the Federal Election Commission (the "Commission") became aware of information suggesting that Freedom's Defense Fund and you, in your official capacity as treasurer, (the "Committee") may have violated the Federal Election Campaign Act of 1971, as amended (the "Act"). On April 10, 2012, the Commission opened MUR 6555 and found reason to believe that the Committee violated 2 U.S.C. § 434(b)(6)(B)(iii) and (g), and 11 C.F.R. § 104.4(b) and (c), provisions of the Act and the Commission's regulations. Enclosed is the Factual and Legal Analysis that sets forth the basis for the Commission's determination.

Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. See 18 U.S.C. § 1519. In the meantime, this matter will remain confidential in accordance with 2 U.S.C. § 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

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We look forward to your response.

On behalf of the Commission,

A handwritten signature in black ink, appearing to read "Caroline C. Hunter". The signature is fluid and cursive, with the first name "Caroline" being more prominent than the last name "Hunter".

Caroline C. Hunter
Chair

Enclosures
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3
4 **RESPONDENT:** Freedom's Defense Fund and **MUR 6555**
5 Scott B. Mackenzie, in his official
6 capacity as treasurer
7

8 **I. INTRODUCTION**

9 This matter was generated based on information ascertained by the Federal Election
10 Commission ("the Commission") in the normal course of carrying out its supervisory
11 responsibilities. See 2 U.S.C. § 437g(a)(2). The Audit Division referred this matter to the Office
12 of General Counsel ("OGC") following an audit of the Freedom's Defense Fund's ("FDF")
13 activity from January 1, 2007 through December 31, 2008. See 2 U.S.C. § 438(b). The Final
14 Audit Report ("FAR"), approved by the Commission on May 27, 2011, contained one finding
15 related to FDF's failure to correctly disclose all of its independent expenditures on Schedule E of
16 its reports filed with the Commission and its failure to file appropriate 24- and 48-Hour Notices
17 of Independent Expenditures.¹ On June 22, 2011, OGC notified the Respondents of the referral
18 in accordance with the Commission's policy regarding notification in non-complaint generated
19 matters. 74 Fed. Reg. 38617 (August 4, 2009). FDF did not submit a response to the
20 Commission's notification. The Commission found reason to believe that Freedom's Defense
21 Fund and Scott B. Mackenzie, in his official capacity as treasurer, violated
22 2 U.S.C. § 434(b)(6)(B)(iii) and (g) and 11 C.F.R. § 104.4(b) and (c).
23

¹ The FAR is available on the Commission's website. See *Audit Report – Freedom's Defense Fund*, http://www.fec.gov/audits/2008/AuditReport_2008_FreedomDefenseFund.shtml.

II. FACTUAL AND LEGAL ANALYSIS

A. Facts

FDF is a multi-candidate committee that has been filing reports with the Commission since July 2004. Pursuant to 2 U.S.C. § 438(b), the Commission authorized an audit of FDF's activity from January 1, 2007 through December 31, 2008. In the normal course of the audit, the Audit Division reviewed FDF's disbursements for media buys during that time period. This review indicated that FDF disbursed \$62,499 in connection with a television advertisement entitled "What Murtha Says, Out of Touch" ("Murtha ad"), which was broadcast in Pennsylvania from September 22, 2008 through November 3, 2008.²

The advertisement regards the 2008 Congressional election in the 12th Congressional District of Pennsylvania and the 2008 Presidential election. The ad contains audio clips of then Presidential candidate Senator Barack Obama and Congressional candidate Rep. John Murtha making negative statements about people from Western Pennsylvania and urges viewers, "On election day, tell Jack Murtha and Barack Obama what we think of them." The ad ends with a verbal and a printed statement to "Vote Republican," and displays a photograph of candidates John McCain and Sarah Palin.

On October 30, 2008, FDF filed a 24-Hour Notice disclosing \$19,001 in independent expenditure-related disbursements to NCC Washington and Red Cap Strategies for the Murtha ad. On December 4, 2008, FDF filed its 2008 Post-General Election Report, which included a Schedule E (Itemized Independent Expenditure Form) disclosing the \$19,001 in disbursements that FDF previously disclosed on the 24-Hour Notice. FDF did not disclose that it made any

² The ad can be viewed on FDF's YouTube Channel, <http://www.youtube.com/user/FreedomsDefenseFund#p/u/12/F2sccXXq8OU>.

1 additional expenditures in connection with the Murtha ad in that report or in any of the
2 subsequent reports it filed with the Commission covering the relevant time period.

3 The Interim Audit Report ("IAR") concluded that FDF disbursed \$60,397 in connection
4 with the Murtha ad,³ that the ad clearly identified candidates Murtha and Obama, and that the ad
5 expressly advocated their defeat in the general election. IAR at 5. The ad also clearly identified
6 then-candidates Senator John McCain and Sarah Palin, and advocated their election. The Audit
7 Division concluded that the Murtha ad constituted an independent expenditure, but that FDF
8 failed to properly disclose all of the costs associated with the ad and also failed to file
9 appropriate 24- and 48-hour notices of independent expenditures. At the time of the IAR, the
10 Audit Division determined that FDF had disclosed only \$19,001 of the \$60,397 expenditure and
11 disclosed the remaining disbursements made in connection with the Murtha ad as operating
12 expenditures. The IAR recommended that FDF amend its FEC reports to disclose the additional
13 \$41,396 of independent expenditures made in connection with the Murtha ad.

14 In response to the IAR, FDF amended its reports by disclosing additional independent
15 expenditures related to the Murtha ad on Schedule E forms included with its 2008 Amended Pre-
16 General, Post-General, and Year-End Reports. FDF indicated that an additional \$2,102 of
17 expenditures that previously lacked documentation were actually associated with the Murtha ad,
18 bringing the total expenditures relating to the Murtha ad to \$62,499 (\$43,498 of which had not
19 been properly disclosed). Of the amount spent on the Murtha ad that the Audit Division
20 identified as requiring disclosure, however, FDF reported only an additional \$31,629 in vendor
21 payments, failing to disclose \$11,869 of the disbursements. Further, FDF did not file the

³ As explained *infra*, the audit later determined that the actual cost of the Murtha ad was \$62,499.

1 appropriate 24- or 48-hour notices for any of the disbursements that it originally reported as
2 operating expenses. *Id.* In addition, because FDF was unable to provide precise dissemination
3 dates for the independent expenditures and failed to maintain sufficiently detailed documentation
4 in order to associate the Murtha ad with the specific invoices, the Audit Division could not
5 determine the number of 24-hour or 48-hour notices that FDF should have filed.

6 On May 27, 2011, the Commission approved the FAR's finding that FDF did not disclose
7 all independent expenditures and did not file all required notices for independent expenditures
8 made. Specifically, FDF failed to report \$11,869 in independent expenditures and failed to file
9 appropriate 24/48-hour notices for independent expenditures totaling as much as \$43,498.

10 **B. Analysis**

11 An independent expenditure is an expenditure that expressly advocates the election or
12 defeat of a clearly identified Federal candidate and that is not made in concert or cooperation
13 with, or at the request or suggestion of, the candidate or his or her committee or agent. 2 U.S.C.
14 § 431(17). A political committee must disclose on a Schedule E the name of a person who
15 receives any disbursement during the reporting period in an aggregate amount or value in excess
16 of \$200 within the calendar year in connection with an independent expenditure by the reporting
17 committee, together with the date, amount, and purpose of any such independent expenditure and
18 a statement that indicates whether such independent expenditure is in support of or in opposition
19 to a candidate, as well as the name and office sought by such candidate. 2 U.S.C.
20 § 434(b)(6)(B)(iii); 11 C.F.R. §§ 104.3(b)(3)(vii) and 104.4(a). Committees are also required to
21 maintain records that provide information with sufficient detail so that the reports may be
22 verified. 11 C.F.R. § 104.14(b)(1).

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1 A political committee that makes or contracts to make independent expenditures
2 aggregating \$10,000 or more in connection with a given election at any time during a calendar
3 year up to and including the 20th day before the date of an election shall file a report describing
4 the expenditures within 48 hours. 2 U.S.C. § 434(g)(2); 11 C.F.R. § 104.4(b)(2). These reports,
5 known as 48-Hour Notices, must be filed by the end of the second day "following the date on
6 which a communication that constitutes an independent expenditure is publicly distributed or
7 otherwise publicly disseminated." 11 C.F.R. § 104.4(h)(2). A committee is required to file
8 additional reports within 48 hours after each time it makes or contracts to make independent
9 expenditures aggregating an additional \$10,000. *Id.*

10 A political committee that makes or contracts to make independent expenditures
11 aggregating \$1,000 or more in connection with a given election after the 20th day, but more than
12 24 hours before the date of an election, is required to file a report describing the expenditures
13 within 24 hours. 2 U.S.C. § 434(g)(1); 11 C.F.R. § 104.4(c). These reports, known as 24-Hour
14 Notices, must be filed within 24 hours "following the date on which a communication that
15 constitutes an independent expenditure is publicly distributed or otherwise publicly
16 disseminated." 11 C.F.R. § 104.4(c). The committee must file additional reports within 24
17 hours after each time it makes or contracts to make independent expenditures aggregating an
18 additional \$1,000. *Id.*

19 An ad contains express advocacy if it uses phrases such as "vote for the President" or
20 "defeat" accompanied by a picture of one or more candidates, or if it contains campaign slogans
21 or individual words, "which in context can have no other reasonable meaning than to urge the
22 election or defeat of one or more clearly identified candidate(s)." 11 C.F.R. § 100.22(a).

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1 Here, the Murtha ad clearly identifies McCain and Palin by name and is accompanied by
2 a photograph and by the exhortation to "Vote Republican Tuesday November 4th." *Supra* at 2.
3 As concluded in the FAR, the ad "provides in effect a specific directive: vote for these pictured
4 candidates. The fact that this message is marginally less direct than 'Vote for Smith' does not
5 change its essential nature." See FAR at fn. 4 (quoting *FEC v. Massachusetts Citizens for Life*
6 *Inc.*, 479 U.S. 238, 239 (1986)). The ad expressly advocates the election of McCain and Palin.

7 Because the Murtha ad contains express advocacy, FDF was required to report
8 disbursements associated with it as independent expenditures. The Audit Division's review of
9 documentation provided by FDF established that FDF did not fully disclose the costs associated
10 with the Murtha ad as independent expenditures on Schedule E forms filed with the Commission.
11 Although FDF amended its reports in response to the IAR, \$11,869 of the total \$62,499 in
12 disbursements associated with the Murtha ad have not yet been properly disclosed on a Schedule
13 E. *Supra* at 3-4. Further, the audit established that 24- and 48-hour notices of independent
14 expenditures were required for the \$62,499 in costs for the Murtha ad, but that FDF disclosed
15 only \$19,001 in such notices. Therefore, FDF failed to file required notices for expenditures
16 totaling \$43,498.

17 Accordingly, there is reason to believe that Freedom's Defense Fund and Scott B.
18 Mackenzie, in his official capacity as treasurer, violated 2 U.S.C. § 434(b)(6)(B)(iii) and (g) and
19 11 C.F.R. § 104.4(b) and (c), by failing to disclose independent expenditures in reports filed with
20 the Commission and failing to file appropriate 24-Hour or 48-Hour Notices of Independent
21 Expenditures.

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